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In The
Supreme Court Of The United States

DONAL MCLEAN SNYDER, III;
DONAL MCLEAN SNYDER, JR.; PAM SNYDER,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

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QUESTIONS PRESENTED

QUESTION 1:

Whether military regulations prohibiting disposal of waste so as not to contaminate water supplies are specific and mandatory such that the discretionary function exception does not apply to the Federal Tort Claims Act?

QUESTION 2:

Must there be a finding on the record that the second tier analysis of *Berkovitz v. United States*, 486 U.S. 531, 536 (1988) was considered before the discretionary function exception can apply?

QUESTION 3:

Is the disposal of toxic industrial waste commonly used in commercial applications the type of conduct that the discretionary function exception was designed to shield?

PARTIES TO THE PROCEEDINGS

Petitioners Donal Mclean Snyder, III; Donal Mclean Snyder, Jr; and Pam Snyder were Plaintiff-Appellants in the Fifth Circuit Court of Appeals.

The United States Government was the Defendant-Appellee in the Fifth Circuit Court of Appeals. There are no other parties.

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INTRODUCTION

This case gives the Court an opportunity to resolve an injustice of significant national impact. Marine Corps Base Camp Lejeune, which over the relevant period of time affected marines and their families from across the nation, contained polluted water wells. The government has admitted the polluting effects of the contamination which existed for more than forty years, and which contamination was present in the water wells at the training base for more than twenty years. Pet. App. 20a. By reasonable estimates, in excess of 1000 marines and their families have suffered from exposure to the contaminants contained in the drinking water supplied by the government. Appallingly, the government has contested this matter on a jurisdictional basis under the discretionary function exception, after publicly declaring their error and fault. The correctness of the government, in taking advantage of veterans and their loved ones, by admitting liability only to avoid providing relief to those injured is at issue in this matter. Significantly, there are two splits between the Circuits. First, there is a conflict over the determination of whether the discretionary function exception at issue in this matter is jurisdictional as the 5th Circuit has determined. Second, there is a conflict between the Ninth and Tenth Circuits as to whether an agency manual creates mandatory obligations such that the manual overcomes the discretionary function exception. The opportunity to provide relief for those service members and their spouses and children exists in this case, as although Petitioners are but one family the decision of this

Court will alter the fate of hundreds of other families with pending suits and Federal Tort Claims Act Notices.

OPINIONS BELOW

The Fifth Circuit Court of Appeal's opinion is unreported and reprinted at Pet. App. 1a-2a.

JURISDICTION

The Fifth Circuit Court of Appeals entered its opinion on October 16, 2008. Pet. App. 1a-2a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

DISCRETIONARY FUNCTION

The Federal Tort Claims Act, 28 U.S.C.A. §§ 1346(b), 2671–2680, waiving the immunity of the United States from suit, contains several specific exceptions precluding recovery on certain tort claims. The "discretionary function or duty" exception contained in 28 U.S.C.A. § 2680(a) excludes from the Act's application any claim based on the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or government employee, regardless of whether the discretion is abused.

The discretionary function located in 28 U.S.C.A. § 2680(a) specifically states:

> (a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

SPECIFIC REGULATION VIOLATED

The Manual of Naval Preventive Medicine specifically states that "**refuse, in any form, should not be disposed of where it may pollute surface or underground waters which are eventually to be used as drinking water**." See Chapter 8, Section 15, Garbage and Refuse Disposal of the Manual of Naval Preventive Medicine Published by the Department of the Navy, Bureau of Medicine and Surgery, June 1957. Pet. App. 17a-18a.

STATEMENT

The case of *Donal Snyder, et al.* is one of many cases filed by attorneys around the country concerning toxic water pollution at Marine Corps Base (MCB) Camp Lejeune, but is the only case of this kind handled by Petitioners' attorneys. All eyes are on this Court's decision in this matter because as the first in a long line of claims it affects hundreds of

families with a multitude of medical issues related to Camp Lejeune contamination.

Donal McLean Snyder, Jr. and his wife Pam were stationed at Marine Corps Base Camp Lejeune, North Carolina ("Camp Lejeune") during the early 1970s while Donal McLean Snyder, Jr. was a young first Lieutenant in the United States Marine Corps. During this time, Pam became pregnant with their son, Donal Snyder, III, who was born on June 8, 1971. As a direct result of pouring cleaning solvents, primarily trichloroethylene (TCE), onto the ground or into barrels which were buried in the ground, the water systems of Camp Lejeune became contaminated. The contaminated water fed wells on the base which supplied drinking water which was consumed by the Snyder family and thousands of other military families. Donal Snyder, III was born with a congenital heart defect caused by his intrauterine and early childhood exposure to TCE which culminated in the replacement of one of his heart valves, permanent monitoring, and is now facing a second open heart surgery.

REASON FOR GRANTING THE PETITION

The United States negligently contaminated the drinking wells that served MCB Camp Lejeune resulting in adverse health effects to residents in violation of the Government's duty to protect the drinking wells from contamination, and further in violation of the Government's own policy and regulations, and such contamination is therefore not protected by the discretionary function exception.

The Fifth Circuit affirmed the District Court ruling that jurisdiction did not exist as the government actions in polluting the drinking water at Camp Lejeune was protected by the discretionary function exception to the Federal Tort Claims Act, 28 U.S.C.A. § 2680(a).

The Seventh Circuit has suggested that the treatment of the discretionary function exception as a jurisdictional prerequisite is not correct.[1] This is in direct contradiction to the ruling of the Tenth Circuit.[2] The jurisdictional issue is in conflict between the circuits[3], and as the Fifth Circuit has ruled that the jurisdictional question must be resolved before the Petitioners can be afforded relief, hundreds of veterans and their families are without recourse after the government has admitted to polluting the drinking water for decades at one of the military's largest training institutions.

The ruling of the Fifth Circuit was in error as the discretionary function did not apply as there was a specific regulation in place which was designed to protect the Petitioners from the damages which they

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[1] *Clark v. U.S.*, 326 F.3d 911, 913 (7th Cir. 2003), citing *Frey v. EPA*, 270 F.3d 1129, 1135 (7th Cir. 2001); *United States v. Cook County*, 167 F.3d 381, 388-89 (7th Cir. 1999); *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 93-95 (1990).

[2] *Miller v. United States*, 710 F.3d 656, 662 (10th Cir. 1983)(quoting *Baird v. United States*, 653 F.2d 437, 440 (10th Cir. 1981).

[3] Resolution of the conflict between two circuits is the province of the United States Supreme Court. *Jackson v. U.S.*, 376 U.S. 503, 84 S. Ct. 869 (1961).

have suffered. Even if the Navy Manual at issue was held not to be specific, there is a conflict between the Ninth and Tenth Circuits as to whether an agency manual creates mandatory obligations such that the manual overcomes the discretionary function exception. [4]

The District Court and the Fifth Circuit determined that the Navy Manual at question did not contain a specific, mandatory provision. That is where their analysis stopped. The complete analysis required in discretionary function cases was neither applied by the District Court nor the Fifth Circuit, and as they have not complied with the tests set forth by this Court, Petitioners request that this matter be remanded for a *Berkovitz* second prong analysis[5] and finding on the record of whether burying and pouring out degreaser onto the ground so that it contaminates drinking water is the sort of choice that the discretionary function was designed to shield.

The nature of the decision of the soldiers at Camp Lejeune in pouring degreaser on the ground is

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[4] Compare *Clark v. U.S.*, 660 F. Supp. 1161 (W.D. Wash. 1987)(holding that the manuals create a mandatory obligation that overcomes the discretionary function exception), aff'd 856 F.2d 1433 (9th Cir. 1988) (affirmed after the *Berkovitz*, 486 U.S. 531 (1988), ruling of this Court) with *Aragon v. U.S.*, 146 F.3d 819 (10th Cir. 1998) (rejecting the *Clark* decision and applying the discretionary function exception to Air Force decisions governed by manuals)

[5] *Berkovitz* by *Berkovitz v. U.S.*, 486 U.S. 531, 108 S. Ct. 1954, 100 L. Ed. 2d 531 (1988), on remand to, 858 F.2d 122 (3d Cir. 1988), and later upheld in *U.S. v. Gaubert*, 499 U.S. 315, 111 S. Ct. 1267, 113 L. Ed. 2d 335 (1991).

not one that implicates a policy judgment[6] and therefore the actions of the government did not include the type of conduct that the discretionary function was designed to shield.[7] The government has admitted that the contamination can be attributed to soldiers pouring the contaminating TCE on the ground after using the chemical for cleaning, as well as the large scale burying of barrels of TCE. Pet. App. 20a. These soldiers pouring out used degreaser were clearly not authorized nor their decisions susceptible to matters of government policy, and as such actions were negligent, the discretionary function should not bar United States liability for such contamination, even if the large scale burying of contaminants should be held to be protected. Petitioners would plead, however, that the contamination of thousands of military families by the very government they serve must not be an exception to the Tort Claims Act.

QUESTION 1: WHETHER MILITARY REGULATIONS PROHIBITING DISPOSAL OF WASTE SO AS NOT TO CONTAMINATE WATER SUPPLIES ARE SPECIFIC AND MANDATORY SUCH THAT THE DISCRETIONARY FUNCTION EXCEPTION DOES NOT APPLY TO THE FEDERAL TORT CLAIMS ACT?

The question before the Court is whether the Fifth Circuit erred in affirming that claims brought by Petitioners against the federal government for

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[6] *Macharia v. United States*, 334 F.3d 61, 68 (D.C. Cir. 2003).

[7] *United States v. Varig Airlines*, 467 U.S. 797 (1984)

poisoning the water at MCB Camp Lejeune, a major military housing complex, resulting in untold numbers of injuries and deaths to residents, and specifically two open heart surgeries and lifetime monitoring on Donal Snyder III, son of a Marine officer stationed at MCB Camp Lejeune, are barred by the discretionary function exception. In reviewing such a question, the Court must consider whether the challenged action is actually a "matter of choice for the acting employee." *Berkovitz v. United States*, 486 U.S. 531, 536 (1988). *Berkovitz* requires two prongs of analysis. The first prong, to be considered in this question, asks whether a federal statute, regulation or policy "specifically prescribes a course of action" for the federal agency to follow, *id.*; if so, the actor has no lawful choice but to follow the directive, and as such, no discretionary judgment is implicated by his ultimate obedience or disobedience. *See United States v. Gaubert*, 499 U.S. 315, 324 (1991)("If the employee violates the mandatory regulation, there will be no shelter from liability because there is no room for choice and the action will be contrary to policy."). Only those regulations "that give no options to a government agency take away the exercise of discretion." *Gotha v. United States*, 115 F.3d 176, 181 (3d Cir. 1997); *see also C.R.S. by D.B.S. v. United States*, 11 F.3d 791, 800-801 (8th Cir. 1993)(no liability where those charged with implementing a mandatory requirement were given wide latitude regarding its execution). The next prong requires the Court to determine whether the choice made is of the sort that the discretionary function was designed to shield, as explained further in Question 3.

The district court in its Memorandum Order focused on the fact that there was not a "specific directive" on how to dispose of the carcinogenic and toxic chemicals at issue in this matter. The Fifth Circuit made no further finding. However, the Navy's own regulations in The Manual of Naval Preventive Medicine specifically states that **refuse, in any form, should not be disposed of where it may pollute surface or underground waters which are eventually to be used as drinking water**." See Chapter 8, Section 15, Garbage and Refuse Disposal of the Manual of Naval Preventive Medicine Published by the Department of the Navy, Bureau of Medicine and Surgery, June 1957. Pet. App. 17a-18a.[8] This Manual prescribed a specific course of action that the Corps failed to follow. The United States Marine Corps is administered by the Department of the Navy, which is led by the Secretary of the Navy (SECNAV), thereby requiring the United States Marine Corps to follow directives of the United States Navy. As a directive was in place, with which Respondent failed to comply, the discretionary function did not apply and the District Court erred.

The Ninth Circuit held that the term "secondary treatment" was a sufficiently specific directive in an Executive Order which required secondary treatment at all new facilities of all government wastes except cooling water and fish

[8] Refuse is not specifically defined by the Manual, but is defined as the "worthless or useless part of something" by Merriam-Webster Dictionary and the American Heritage Dictionary.

hatchery effluents. *Starrett v. United States*, 847 F.2d 539, 542 (9th Cir. 1988). If an undefined term such as "secondary treatment"[9] is sufficiently specific, it seems axiomatic that a clear directive such as the one found in the Navy Manual not to dispose of waste where it *may* pollute ground water is a binding specific directive.[10]

To further muddy the waters, there appears to be confusion among the Circuit Courts as to how to apply this Court's rulings as to military manuals governing waste disposal. *Clark v. United States*, 856 F.3d 1433 (9th Cir. 1988)[11] in affirming the District Court ruling that the manuals create a mandatory obligation that overcomes the discretionary function exception reached the opposite conclusion of *Aragon v. United States*, 146 F.3d 819 (10th Cir. 1998). The manual at issue in the above cases contained a specific acknowledgment that it

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[9] Petitioners acknowledge that although the Executive Order did not offer a definition, the Starrett Court found a definition of secondary treatment in the Clean Water Act, 33 U.S.C. § 1311.

[10] The Plaintiffs in *Starrett* also relied on the Navy's 1957 Manual on Naval Preventive Medicine (written by Navy Bureau of Medicine and Surgery). The *Starrett* Court stated that because it found the Executive Order to be a specific and mandatory directive to the Navy to prove secondary treatment for wastes and to prevent their being discharged if the constitute a health hazard, it did not consider the Navy Manual.

[11] *Clark* does not precede the *Berkovitz* ruling as the Ninth Circuit affirmed the District Court after this Court's opinion in *Berkovitz* was issued.

was "intended for guidance" and "because of the varied nature of industrial problems, principles rather than practices are emphasized." *Id.* at 824-825. Clearly under the 9th Circuit *Clark* decision the directive of the Navy Manual not to dispose of waste where it may pollute ground water would be seen as a mandatory obligation sufficient to bind the government.

There is an admitted difficulty by lower courts in applying the discretionary function exception, which explains the conflict between the Ninth and Tenth Circuits. Circuit Judge Henry in a concurring opinion in *Domme v. U.S.*, 61 F.3d 787 (10th Cir. 1995) in explaining the difficulty in determining the existence of the exception stated: ".... The Federal Tort Claims Act was a response to a growing revelation that the king and his agents could clearly do wrong..... Perhaps because sovereign immunity is inconsistent with American political institutions, the discretionary function cases remain difficult to classify and reconcile." The confusion among the Circuits, which has limited the relief for a dedicated veteran and his family, and which holds the relief for hundreds of other claims, creates an issue which only this Court can resolve.

The United States violated a rule designed to prohibit just the sort of grave physical harm caused to the Petitioners. The government should be liable for its negligence as a binding directive against ground water pollution existed, which necessitates that the discretionary function exception cannot apply.

The decision in *Indian Towing Co v. United States*, 350 U.S. 61, 76 (1955), which although questioned in lower court decisions[12], was not renounced by this Court in the *Berkovitz* and *Gaubert*[13] decisions, also demonstrates the appropriate scope of the discretionary function exception. Although, Petitioners acknowledge that the government did not claim the benefit of the discretionary function exception, it is applicable in such cases, as can be demonstrated by this Court's inclusion of same in any thorough review of the discretionary function. The Plaintiff in that case sued the Government for failing to maintain a lighthouse in good working order causing the grounding of a boat. This Court held that "the Coast Guard need not undertake the lighthouse service. But once it exercised its discretion to operate a light...and engendered reliance on the guidance afforded by the light, it was obligated to use due care to make certain that the light was kept in good working order." *Indian Towing*, 350 U.S. at 69. This Court added that, "if the light did become

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[12] See *Compagnie Maritime Marfret, et al v. San Juan Bay Pilots Corporation, et al*, 532 D. Supp. 2d 369, 390 (Puerto Rico District Court 2008) for an overview of cases in the First Circuit which claim that *Indian Towing* has been undercut by this Court.

[13] "The United States was held liable, not because the negligence occurred at the operational level but because making sure the light was operational 'did not involve any permissible exercise of policy judgment" once it exercised its discretion to operate a lighthouse. *United States v. Gaubert*, 499 U.S. 315, 326 (1990). *Berkovitz v. United States*, 486 U.S. 531 (1988).

extinguished, then the Coast Guard was further obligated to use due care to discover this fact and to repair the light or give warning it was not functioning." *Id.*

The First Circuit has held that the ruling of this Court is that "the government, just as any private person who undertakes to warn the public of danger and thereby induces reliance, must not worsen the position of those who have come to rely on the service by carelessly omitting it." *Chute v. United States*, 610 F.2d 7, 13-14 (1st Cir. 1979). *Indian Towing* is still relied on for the principle that the "government must not mislead, and must not induce reliance upon a belief that it is providing something, which, in fact, it is not providing." *Compagnie Maritime*, 532 D. Supp. 2d at 391, citing *Chute*, 610 F. 2d at 14.

In the present case, the exercise of judgment and discretion was taken at the time of the enactment of policy against ground water contamination and protection of military drinking water supply and the promulgation of the Department of Navy regulations preventing disposal of waste in such a way that would pollute drinking water. Once the exercise of judgment was taken, the violation of that rule was an act of negligence and/or negligence per se. Therefore, the government's actions are not subject to the discretionary function.

The cases relied upon by the United States in the District Court and on appeal to the Circuit Court, specifically *Aragon v. United States*, 146

F.3d 819 (10th Cir. 1998) and *Ross v. United States*, 129 Fed. Appx. 449 (10th Cir. 2005), may be distinguished from the case at bar. Both of these cases do deal with TCE contamination, but neither has regulations as directly on point as those concerning Camp Lejeune and contamination of drinking water. In *Ross*, the plaintiffs conceded that no such statute or regulation was involved, and therefore the government's actions were considered discretionary under the first step of the *Berkovitz* test. In *Aragon*, the Air Force manual relied upon by the plaintiffs, was intended only for guidance and not as regulations to be followed by the agency. The Court in *Aragon* relied on Air Force Manual 85-14 and its specific statement that it is "intended for guidance" and "[b]ecause of the varied nature of industrial problems, principles rather than practices are emphasized." This express qualification weighed heavily against the Court ruling the Manual prescribed mandatory directives for the Air Force to follow. *Aragon*, *supra*. No such statement is found in the Navy Regulation at issue in this matter.

The United States Department of the Navy Manual of Naval Preventive Medicine, Chapter 8, Section 15, which specifically states that "**refuse, in any form, should not be disposed of where it may pollute surface or underground waters which are eventually to be used as drinking water**" is a clear directive which rises above the mere guidance in *Aragon* and supplies the regulation lacking in *Ross*. The Manual specifically acknowledges that "in military experience, the hazards to health associated with refuse disposal are

frequently of greater importance than is the case in the civilian community." See Chapter 8, Section 2, Garbage and Refuse Disposal of the Manual of Naval Preventive Medicine Published by the Department of the Navy, Bureau of Medicine and Surgery, June 1957. Pet. App. 17a-18a. The Petitioners were members of the class designed to be protected by the Manual regulations. The clear directive of the Appellee was to protect the water source on military bases such as MCB Camp Lejeune, and thereby protect Marines and their dependents who would be using that water source. As a clear directive existed by virtue of the Navy regulation above, the government had "no rightful option but to adhere to the directive." *Aragon* at 823-24. The governing regulations in this case prescribe a course of action, and the exercise of judgment and discretion was taken at the time of the enactment of such policy and regulation. Therefore, the government's conduct is not subject to the discretionary function, and the Court of Appeals erred in affirming the District Court.

QUESTION 2: MUST THERE BE A FINDING ON THE RECORD THAT THE SECOND TIER ANALYSIS OF *BERKOVITZ V. UNITED STATES*, 486 U.S. 531, 536 (1988) WAS CONSIDERED BEFORE THE DISCRETIONARY FUNCTION EXCEPTION CAN APPLY?

Petitioners believe there is no need to proceed to this second tier as the governing regulations in this case prescribed a course of action, and the exercise of judgment and discretion was taken at the time of the creation of the policy to prevent

groundwater pollution and the regulation enacted to protect such groundwater; thus the government should not be protected from this suit by the Petitioners. However, if the decision under Question 1 results in a determination that the Fifth Circuit did not err in affirming the District Court's ruling that the First Prong analysis results in a determination that there was an absence of a mandatory directive at Camp Lejeune, then a Second Prong Analysis must be commenced.

With the absence of a mandatory directive, and therefore the presence of some degree of judgment, the second prong requires the Court to determine whether the choice made is of the sort that the discretionary function exception was designed to shield. This Court has observed that in enacting the exception, "Congress wished to prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic and political policy through the medium of an action in tort." *United States v. Varig Airlines*, 467 U.S. 797, 814 (1984). As such, the exception does not protect all governmental actions and decisions that include an element of choice. Instead, shields *only* those that are "susceptible to policy analysis" or based on "considerations of public policy." *U.S. v. Gaubert*, 499 U.S. 315, 111 S. Ct. 1267, 113 L. Ed. 2d 335 (U.S. 1991).

The District Court failed to apply the Second Prong of the *Berkovitz* analysis to determine whether the discretion exercised was of the type that the exception was designed to shield–i.e., choices that are grounded in social, economic, and political

policy. *Id.* Without the District Court having addressed the second tier policy analysis, there is a presumption that there is a policy in Petitioners' favor. Once a discretionary function is involved, the second tier test must be evaluated, and the failure of the District Court to apply the second tier analysis of *Berkovitz* was in error, and the Court of Appeals erred in affirming such decision.

QUESTION 3: IS THE DISPOSAL OF COMMON INDUSTRIAL WASTE THE TYPE OF CONDUCT THAT THE DISCRETIONARY FUNCTION EXCEPTION WAS DESIGNED TO SHIELD?

Although, Petitioners assert that the conduct of the government, in polluting the ground water at Camp Lejeune, was not discretionary, and that the discretionary act, if any, was in the promulgation of the 1957 Navy regulation, if the Court finds that the challenged conduct was "discretionary," then a second tier analysis must be performed to determine whether the discretion exercised was of the type that the exception was designed to shield-i.e., choices that are grounded in social, economic, and political policy. *Gaubert*, 499 U.S. 315, 111 S. Ct. 1267, 113 L. Ed. 2d 335; *Miller v. U.S.*, 163 F.3d at 594 ("The decision need not be actually grounded in policy considerations, but must be, by its nature, susceptible to a policy analysis").

The Marine Corps was not required to exercise its discretion with respect to how to avoid contamination of the Camp Lejeune water supply. Burying large quantities of solvent chemicals on

base grounds which could contaminate the drinking supply of the base is not subject to a policy analysis, but is a clear violation of the proscribed action under the government's own regulation. The Manual of Naval Preventive Medicine specifically states that disposal of refuse "is of medical importance because of the associated hazards to health." Additionally the Manual acknowledged that refuse produces disease by the toxic chemicals which it may contain, and goes on to state the policy intention to prevent pollution as "rivers, lakes, and other sources of water may be so heavily polluted by refuse that treatment of the water to make it safe for drinking becomes difficult and costly." See Chapter 8, Section 15, Garbage and Refuse Disposal of the Manual of Naval Preventive Medicine Published by the Department of the Navy, Bureau of Medicine and Surgery, June 1957. Pet. App. 17a-18a.

The protected conduct was in making the policy to protect groundwater and promulgating regulations to enforce such policy.

In *Loughlin v. U.S.*, 393 F.3d 155 (D.C. Cir. 2004), claims arising from the government's allegedly negligent handling and disposal of munitions in a District of Columbia neighborhood during the World War I era were barred. Loughlin may be distinguished from the case at bar because in Loughlin the claims were based on disposal of munitions, clearly a military and government policy issue. The decision on the disposal of contaminants and refuse do not rise to the level of public policy, but rather are issues dealt with by

landfills and waste removal companies on a daily basis.[14]

Although Petitioners believe that *Aragon*, *supra*, can be distinguished factually, this Court should also take notice of the Tenth Circuit's ruling that groundwater that serves the families of military personnel can freely and intentionally be polluted by toxic chemicals on United States' soil without consequence to the United States, as long as such contamination occurs during a time of military

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[14] It should also be noted that the Court reached the second prong analysis in *Loughlin* only after determining the "regulations" at issue were a mere Bulletin and a Manual of Gas Warfare. The Manual was a "proposed publication and intended for combat units and not a research and development facility and the Bulletin was not intended to be a binding directive but a means of sharing information and was addressed again to combat units. This is distinguishable from the Petitioners' claim as the Navy Manual Regulation at issue here does not state that it should be used only for guidance. It is difficult to argue that pollution of ground water by burying toxic chemicals is a discretionary function when if someone were to intentionally pollute drinking water it would be a crime and such pollution is recognized to be a crime today. The undersigned's review of 10 U.S.C. § 892, Article 92 of the Uniform Code of Military Justice indicates that the commanding officer at MCB Camp Lejeune could have been subject to appropriate disciplinary action for failure to follow the Navy Manual in question. Article 92 states that any person who violates or fails to obey any lawful regulation ***shall be punished*** as a court-martial may direct. Further, Rules of Court Martial 1003 specifies that failure to obey a lawful regulation may subject you to 2 years confinement in a military prison. Therefore, the pollution of groundwater with toxic chemicals was not within the discretion of the officers at MCB Camp Lejeune.

conflict. The *Aragon* court held that because the base in question operated under military "exigencies during World War II, the Korean conflict, the Vietnam Conflict and the Cold War" the military was allowed to place military concerns above groundwater protection. 146 F.3d 819, 826. The essence of this argument is that if there is any military conflict anywhere in the world in which the United States is involved, the military is free to pollute the water its soldiers and dependents drink back home on U.S. soil. This result cannot be allowed to stand. The offensive nature of the *Aragon* result was affirmed by the Eleventh Circuit, when that Circuit determined that the military was free to pollute surrounding wells solely because there were military concerns. *OSI, Inc. v. US*, 285 F.3d 947, 953 (11th Cir. 2002). As a dominating world power, the United States is perpetually embroiled in conflict throughout the world, the military's function is the protection of this Country in such conflict by the use of dedicated voluntary soldiers. The poisoning of those soldiers on our own soil cannot be allowed to be weighed against military concerns thousands of miles away.

It is the Petitioners' position that the Court of Appeals erred in failing to apply the second tier analysis of *Berkovitz*. However, even if a second tier analysis was done, the clear policy of the United States, as shown in the standard operating procedure set forth in the Manual of Naval Preventive Medicine, in the legislative history of the FTCA, and the enactment of the SDWA and the CWA, is to prevent drinking water contamination. Burying large quantities of solvent chemicals on

base grounds which could contaminate the drinking supply of the base is not subject to a policy analysis.

The United States negligently contaminated the drinking wells that served MCB Camp Lejeune resulting in adverse health effects to residents in violation of the Government's duty to protect the drinking wells from contamination, and further in violation of the Government's own policy and regulations, and such contamination is therefore not protected by the discretionary function exception.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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January 14, 2009

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 07-60671

D.C. DOCKET NO. 1:04-CV-627HSO-JMR

DONAL MCLEAN SNYDER, III; DONAL MCLEAN SNYDER, JR.; PAM SNYDER,

Plaintiffs – Appellants

v.

UNITED STATES OF AMERICA,

Defendant – Appellee

Appeal from the United States District Court
for the Southern District of Mississippi
USDC No. 1:04-cv-627

Before JOLLY, BARKSDALE, and HAYNES, Circuit Judges.

PER CURIAM:*

The Snyder family appeals the district court's dismissal for want of subject matter jurisdiction of their lawsuit against the United States. Premising jurisdiction on the Federal Tort Claims Act, the Snyders brought various tort claims against the United States based upon its alleged misconduct in disposing of waste at a Marine Corps base in the

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

early 1970s. 28 U.S.C. § 1346(b)(2006) We have carefully reviewed the parties' briefs and the pertinent portions of the record. The district judge entered a thorough and thoughtful opinion styled as an Order and Reasons Dismissing Case for Lack of Subject Matter Jurisdiction. Essentially for the reasons stated by the district court, the judgment of the district court is AFFIRMED.

FILED: OCTOBER 16, 2008

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF
MISSISSIPPI
SOUTHERN DIVISION

DONAL McLEAN SNYDER, III, ET AL.	§	PLAINTIFFS
v.	§	CIVIL NO. 1:04CV627HSO-JMR
UNITED STATES OF AMERICA	§	DEFENDANT

ORDER AND REASONS DISMISSING CASE FOR LACK OF SUBJECT MATTER JURISDICTION

BEFORE THE COURT is Defendant's Motion to Dismiss, or, in the alternative, for Summary Judgment and Plaintiffs' Motion for Summary Judgment on the Applicability of the Discretionary Function Exception to Waiver of Sovereign Immunity Under the Federal Tort Claims Act. Both motions have now been fully briefed and are ripe for resolution. After due consideration of the submissions and the relevant law, it is the opinion of the Court that Plaintiffs' claims, brought pursuant to the Federal Tort Claims Act ["FTCA"], specifically 28 U.S.C. §§ 1346(b), 2671-80, are not within the sovereign immunity waiver of the FTCA; therefore, this Court lacks subject matter jurisdiction. Plaintiffs' Motion for Summary Judgment must therefore be denied, the Defendant's Motion to Dismiss must be granted, and the above captioned

cause should be dismissed pursuant to FED. R. CIV. P. 12(b)(1).

I. FACTS AND PROCEDURAL HISTORY

The facts of this case originate during the time when Donal McLean Snyder, Jr., served as a First Lieutenant in the United States Marine Corps. Snyder and his wife Pam were stationed at Camp LeJeune, North Carolina, from March through December of 1970. At that time, the Snyder family was relocated. A son, Donal McLean Snyder, III, was born the following January, 1971. Donal III was born with a congenital heart defect, known as bicuspid aortic valve ["BAV"]. Extensive medical treatment culminated in Donal III undergoing a heart valve replacement. The Snyders returned a second time to Camp LeJeune in July of 1971 and remained stationed there until October of 1972.

According to the Plaintiffs' Complaint, as a result of military personnel using degreasing agents to clean tanks and weapons on the base, toxic chemicals trichloroethylene ["TCE"] and tetrachloroethylene ["PCE"] contaminated the water system of Camp LeJeune. Plaintiffs claim that because TCE and PCE were disposed of by being poured into barrels and then directly onto the ground, these toxic chemicals seeped into the soil system resulting in contamination of the underground water supply at Camp LeJeune. Plaintiffs further claim that because Pam Snyder consumed the water from Camp LeJeune while she was pregnant with Donal III, she was exposed to TCE and PCE toxins which resulted in Donal III being born with the BAV congenital heart defect.

Finally, Plaintiffs contend that because the Government failed to properly dispose of the waste materials and issued untimely and inadequate warnings, Donal III was also exposed to the chemicals in Camp LeJeune's water supply during his early childhood years.

Plaintiff, Donal McLean Snyder, III, together with his parents, Donal McLean Snyder, Jr., and Pam Snyder filed the above captioned cause pursuant to the FTCA, alleging that the United States government is liable to them for damages associated with the BAV defect from which Donal III suffers. The operative Complaint in this case asserts the following tort claims against the United States, with the claims of the Snyder parents being derivative in nature: 1) that Defendant negligently maintained and/or protected the water supply at Camp LeJeune; 2) that Defendant acted with reckless disregard, to the point of being an intentional act, for the Plaintiffs' welfare; 3) that Defendant was grossly negligent in disregarding the welfare of Plaintiffs to the degree that such disregard amounted to an intentional act; 4) that Defendant breached its duty of care by failing to adequately oversee the water supply at Camp LeJeune; and 5) that Defendant intentionally inflicted emotional distress upon the Plaintiffs in connection with the negligent contamination of the water supply at Camp LeJeune. Ct. R. #4, Plaintiffs' Am. Comp. filed August 17, 2004.

Defendant filed a Motion for Summary Judgment on February 22,2006. Plaintiffs filed a collective response on March 23, 2006, followed by the Defendant's reply on April 3, 2006. Subsequent

to the above captioned cause being reassigned to United States District Judge Louis Guirola, the Court entered an order denying Defendant's Motion for Summary Judgment but directing both parties to file Motions on the question of the Court's subject matter jurisdiction over this case, namely the issue of the applicability of the discretionary function exception to the FTCA. Ct. R. # 57, Op. at p. 3. The instant Motions were then filed by the Defendant and the Plaintiffs on March 23, 2007. Both parties have filed Responses and the Defendant has filed a Rebuttal. The above captioned cause was reassigned to the undersigned on May 21, 2007.

II. DISCUSSION

A. *The Court's Subject Matter Jurisdiction Over Tort Claims Against the United States*

Federal courts are courts of limited jurisdiction, *see* 13 CHARLES WRIGHT & ARTHUR MILLER, *Federal Practice and Procedure* § 3522 (1984), and must consider the question of subject matter jurisdiction *sua sponte* if it is not raised by the parties. The Court must dismiss any action if such jurisdiction is lacking. *See* FED. R. CIV. P. 12(h)(3); *Matter of Kutner*, 656 F.2d 1107, 1110 (5th Cir. 1981), *cert. denied*, 455 U.S. 945 (1982). "[J]urisdiction goes to the core ofthe court's power to act, not merely to the rights of the particular parties. If jurisdiction could be waived or created by the parties, litigants would be able to expand federal jurisdiction by action, agreement, or their failure to perceive a jurisdictional defect." *Giannakos v. M/V Bravo Trader*, 762 F.2d 1295, 1297 (5th Cir. 1985). "[W]hatever route a case arrives in federal court, it is

the obligation of both district court and counsel to be alert to jurisdictional requirements.... [t]hat obligation is equally applicable to cases initially filed in federal court and cases removed from state court to federal court." *Grupo Dataflux v. Atlas Global Group, L.P.*, 541 U.S. 567, 593 (2004).

Federal courts are without subject matter jurisdiction to hear suits against the United States unless there has been a waiver of sovereign immunity. *See United States v. Sherwood*, 312 U.S. 584, 591 (1941). The Federal Tort Claims Act, enacted by Congress in 1946, is a limited waiver of sovereign immunity, making the federal government liable to the same extent as a private party for certain torts of federal employees acting within the scope of their employment. *See United States v. Orleans*, 425 U.S. 807 (1976). The Federal Tort Claims Act generally removes the protection of sovereign immunity for the government in cases where government employees have caused damage by their negligence during the course of their employment. *See Aretz v. United States*, 604 F.2d 417, 426 (5th Cir. 1979). This waiver of sovereign immunity is subject to a number of exceptions, among them the discretionary function exception which makes the government immune from liability for:

> Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on

> the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

28 U.S.C. § 2680(a).

The applicability of the discretionary function exception involves a two-step analysis. First, because the exception covers only acts that are discretionary in nature, there must be a determination of whether the challenged act involves an element of "judgment or choice." *United States v. Gaubert*, 499 U.S. 315, 322 (1991); *Berkovitz v. United States*, 486 U.S. 531, 536 (1988). This requirement is not satisfied if a federal statute, regulation or policy specifically prescribes the course of action that the government employee must follow, for in this situation the employee "'has no rightful option but to adhere to the directive.'" *Gaubert*, 499 U.S. at 322, *quoting Berkovitz v. United States*, 486 U.S. 531, 536 (1988). Second, if the action involves a choice or judgment, then a determination must be made "whether that judgment is of the kind that the discretionary function exception was designed to shield." *Berkovitz*, 486 U.S. at 536. The exception insulates government decisions based on social, economic, and public policy. *See id.* A government regulation giving government employees discretion "creates a strong presumption that a discretionary act authorized by the regulation involves consideration of the same policies which led to the promulgation of the regulations." *Gaubert*, 499 U.S. at 324. "Congress wished to prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort. By fashioning an

exception for discretionary governmental functions, including regulatory activities, Congress took 'steps to protect the Government from liability that would seriously handicap efficient government operations.'" *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 814 (1984), *quoting United States v. Muniz*, 374 U.S. 150, 163 (1963).

B. *Analysis of the Parties' Arguments*

Plaintiffs submit that the discretionary function exception does not apply since at the time they resided at Camp LeJeune, the following Naval Regulation was in place which they claim prescribed a specific course of action:

> "refuse, in any form, should not be disposed of where it may pollute surface or underground waters which are eventually to be used as drinking water."

The record reveals that this particular directive regarding disposal of refuse was published in the Manual of Naval Preventative Medicine in June of 1957: Ch. 8, § 15 Garbage & Refuse Disposal. *See* Ex. "A" to Pls.' Mot. for Summ. J. Plaintiffs contend that as a result of the Defendant violating this regulation, they sustained harm that was preventable. The Defendant argues that because the presence of TCE and PCE was not discovered at Camp LeJeune until the 1980's, there were no requirements in place during the relevant time period regarding the use and disposal of the chemicals used on the base.

The Defendant correctly points out that TCE and PCE were not regulated as toxic pollutants under the Clean Water Act until August 25, 1978, well after the time period relevant to this lawsuit. *See* 40 C.F.R. Part 403 (1978). The Environmental Protection Agency ["EPA"] did not regulate TCE or PCE as hazardous wastes under the Resource Conservation and Recovery Act ["RCRA"] until November 19, 1980. *See* 40 C.F.R. Part 261. The EPA did not regulate TCE or PCE as drinking water contaminants under the Safe Water Drinking Act until January 1989, and July 1992, respectively. *See* 52 Fed. Reg. 25,690 (July 8, 1987) and 56 Fed. Reg. 3,526 (Jan. 30, 1991); *see also* Exs. "10", "11", "12" and "13" att. to Def's Mot. for Summ. J. In short, there were no government regulations which specifically regulated TCE and PCE at the time Plaintiffs allege they were exposed to these chemicals.

Plaintiffs have not identified any other federal statute or rule in place during the relevant time period other than the aforementioned naval regulation. That regulation nowhere mentions TCE and PCE and addresses only "refuse" disposal in general. Nor does it offer any specific guidance regarding how to dispose of refuse, leaving to military personnel the determination of whether a particular disposal location would fall within the meaning of the phrase "where it [refuse] may pollute surface or underground waters." Therefore, this provision cannot be construed as a specific directive for handling the disposal of TCE and PCE during the time that Plaintiffs resided at or near Camp LeJeune. *See OSI, Inc. v. United States*, 285 F.3d 947, 953 (11th Cir. 2002)(agency manual which

provides only objectives and principles for a government agent to follow does not create mandatory directive which overcomes the discretionary function exception to the FTCA. "The nature of the military's function requires that it be free to weigh environmental policies against security and military concerns. We hold that the decisions at issue here reflect the kind of judgment that the discretionary function exception is designed to shield.")

Due to the absence of any regulations specifically delineating how to dispose of TCE and/or PCE during the time of Plaintiffs' allegations, the Supreme Court and Fifth Circuit authorities discussing the discretionary function exception lead to the conclusion that the manner in which the Marine Corps decided to dispose of these chemicals during the time frame at issue fell within the definition of a discretionary function, rendering the Defendant immune from suit.

While the Fifth Circuit has authored opinions on the discretionary function exception to the FTCA, *supra.*, there have been no decisions addressing similar factual contexts to those presented here. The cases most factually analogous to this one derive from the Tenth Circuit in *Ross v. United States*, 129 Fed.Appx. 449 (10th Cir. 2005)[1] and *Aragon v. United*

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[1] Unpublished opinions issued on or after January 1, 1996, have no precedential or binding value except under the doctrine of *res judicata*. *See* 5th CIR. R. 47.5.4. However, they may be cited if they have persuasive value with respect to a material issue that has not been addressed in a published opinion and the unpublished disposition would assist the court. *See id.*

States, 146 F.3d 819 (10th Cir. 1998). In both cases, plaintiffs, landowners who lived adjacent to military installations, claimed that United States Air Force operations generated TCE contamination which polluted residential water wells.

In *Aragon*, the former Walker air military base in Roswell, New Mexico, was utilized during the period of 1942-1949 as a training ground for pilots and a subsequent strategic command post during the Korean War. Military personnel washed aircraft and aircraft engines on the base with TCE, a known degreasing agent commonly used by the military during that time. In 1967, the government deactivated the Walker Base. In 1991, the New Mexico Environmental Department detected TCE in plaintiffs' wells located near the east boundary ofthe facility. The Army Corp of Engineers subsequently identified the probable source of contamination at the base site. The *Aragon* plaintiffs filed claims with the Air Force for compensation, including diminution of property value, which were denied. Plaintiffs then filed suit against the United States under the FTCA, asserting the same causes of action for diminution of property value and also for personal injuries, emotional distress and other related compensation. *See Aragon*, 146 F.3d at 822.

The Tenth Circuit affirmed the district court's dismissal of the claims for lack of subject matter jurisdiction based on the application of the FTCA discretionary function exception. Specifically, the Court found that the discretionary function exception to the FTCA precluded recovery, in that the Air Force had discretion regarding its handling and disposal of wastewater from its aircraft cleanup

operations. The Court stated in part that "there is little doubt that the actions involved policy choices of the most basic kind.... [i]ndeed, the record makes clear the military recognized it needed flexibility to weigh its groundwater protection policies against broader public and military policies; thus it allowed the Air Force to place security and military concerns above any other concerns." *Id.* at 826.

The Plaintiffs in the present case raise an inadequate warning argument similar to that advanced by the plaintiffs in *Ross v. United States*, 129 Fed.Appx. 449 (10th Cir. 2005). There, after TCE was discovered in the groundwater of the homes in Tinker View Acres, adjoining Tinker Air Force Base in Oklahoma City, Oklahoma, Ross and other adjacent landowners brought suit under the FTCA against the federal government for creating a public and private nuisance when it generated hazardous waste on the base, and then allegedly allowed the waste to "permeate the groundwater and migrate to the residents' property." *Ross*, 129 Fed.Appx. at 450. The Ross plaintiffs argued that the pollution damaged their property values and could impact their health. They also asserted that the government issued untimely and inadequate warnings. The Tenth Circuit determined that the plaintiffs did "not specifically allege an absence of warning; rather, they argue that the warnings they did receive were 'untimely and inadequate.' Again, we agree with the district court that the policy choices surrounding the warnings given (or the delayed issuance thereof) are likewise shielded by the discretionary function exception." *Id.* at 451.

In the case *sub judice*, the timing of any disclosures regarding TCE and PCE contamination at Camp LeJeune would also implicate policy concerns that are "grounded in policy discretion and, as such, are shielded by the discretionary function exception to the FTCA." *Ross*, 129 Fed.Appx. at 452; *OSI, Inc. v. United States*, 285 F.3d 947,952 (11th Cir. 2002); *Aragon v. United States*, 146 F.3d 819, 827 (10th Cir. 1998). Based on United States Supreme Court and Fifth Circuit precedents regarding the application of the general discretionary function exception, as well as the conclusions reached by the Tenth Circuit in cases with similar factual scenarios, this Court can only conclude that, at the time the Snyders were stationed at Camp LeJeune, no specific directive controlled the military's discretion in disposing of or providing warnings about TCE and PCE. The actions of which Plaintiffs complain can only be classified as ones involving judgment or choice, placing them within the discretionary function exception of the FTCA. The authorities cited herein make it clear that these types of decisions by the military regarding operations at Camp LeJeune were the kinds of government policy choices the discretionary function exception was designed to shield. As such, the Defendant has not waived sovereign immunity under the facts of this case, and the Court therefore lacks subject matter jurisdiction to hear the Plaintiffs' claims.

III. CONCLUSION

The facts and circumstances of this case are most unfortunate, however this Court cannot assume jurisdiction where none exists. The Fifth

Circuit in considering the discretionary function exception to the Federal Tort Claims Act has repeatedly held that challenges to the Court's jurisdiction are properly treated as Motions to Dismiss under FED. R. CIV. P. 12(b)(1). *See ALX El Dorado, Inc. v. Southwest Sav. and Loan Association/FSLIC*, 36 F.3d 409, 410 (5th Cir. 1994), *citing McNeily v. United States*, 6 F.3d 343, 347 (5th Cir. 1993); *Davis v. U.S.*, 961 F.2d 53, 57 (5th Cir. 1991). After careful consideration of the pleadings filed in this case and the history of the parties' litigation of this issue, it is the opinion of the Court that Plaintiffs' Complaint is barred by the FTCA's discretionary function exception. Defendant's Motion to Dismiss must therefore be granted. Accordingly,

IT IS, ORDERED AND ADJUDGED, that, pursuant to FED. R. CIV. P. 12(b)(1), the above captioned cause is dismissed for want of subject matter jurisdiction.

IT IS, FURTHER ORDERED AND ADJUDGED, that all remaining pending motions are hereby **DENIED AS MOOT**.

SO ORDERED AND ADJUDGED this the 1st day of August, 2007.

s/ Halil Suleyman Ozerden

HALIL SULEYMAN OZERDEN
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 07-60671

D.C. DOCKET NO. 1:04-CV-627HSO-JMR

DONAL MCLEAN SNYDER, III; DONAL MCLEAN SNYDER, JR; PAM SNYDER

Plaintiffs – Appellants

v.

UNITED STATES OF AMERICA

Defendant – Appellee

Appeal from the United States District Court for the Southern District of Mississippi, Gulfport

Before JOLLY, BARKSDALE, and HAYNES, Circuit Judges.

J U D G M E N T

This cause was considered on the record on appeal and the briefs on file.

It is ordered and adjudged that the judgment of the District Court is affirmed.

IT IS FURTHER ORDERED that plaintiffs-appellants pay to defendant-appellee the costs on appeal to be taxed by the Clerk of this Court.

ISSUED AS MANDATE: December 9, 2008

FILED: DECEMBER 10, 2008

[Excerpt from Chapter 8, Section 15, Garbage and Refuse Disposal of the Manual of Naval Preventive Medicine Published by the Department of the Navy, Bureau of Medicine and Surgery, June 1957, attached as Exhibit "A" to Plaintiff's Motion for Summary Judgment on the Applicability of the Discretionary Function Exception to Waiver of Sovereign Immunity Under the Federal Tort Claims Act (FTCA), Docket No. 63-2, Page 7 of 15, Snyder v. USA, U.S. District Court Southern District of Mississippi, Southern Division, CA#1:04cv00627-LG-JMR. Entered: March 23, 2007]

8-15. Water Pollution

(1) Disposal of refuse into rivers, lakes, harbors, and their watersheds overloads water-purification systems and destroys sources of fish and shellfish, or makes the fish unfit for food. In recreational areas, this practice may introduce pollution and safety hazards and decrease the esthetic appeal.

(2) Most of the laws and regulations pertaining to control of water pollution are directed toward regulating the disposal of raw sewage into natural waters. However, the organic component of refuse–garbage–also contributes to water pollution, primarily, by increased biological oxygen demand (B.O.D.) of the water rather than by introduction of infectious agents. The addition of organic material not only causes a drain on available oxygen but perpetuates the condition by destruction of plant and animal life, which, in turn, increases pollution and B.O.D. Progression of this cycle tends to produce foul anaerobic conditions, the correction of which is

much more difficult than is their prevention. Refuse, in any form, should not be disposed of where it may pollute surface or underground waters which are eventually to be used as drinking water. Garbage grinders have made it possible to dispose of garbage into the sewerage system, where it can be treated and reduced as sewage provided the capacity of the system permits. The sanitary landfill is an excellent substitute for the open dump, which spoils land for future use. Since refuse dumped into the water may spoil bathing and other types of recreational areas, this practice is usually restricted by law. In disposal at sea, both dilution and natural biological reduction of the organic component counteract contamination of the water.

[Excerpt from United States' Memorandum in Support of its Motion to Dismiss or, in the Alternative, Motion for Summary Judgment, Page 3; Docket No. 65-1, Page 8 of 24, Snyder v. USA, U.S. District Court Southern District of Mississippi, Southern Division, CA#1:04cv00627-LG-JMR. Entered: March 26, 2007]

* * *

Over the past sixty-five years, Camp Lejeune has played a vital role in the Marine Corps' mission to preserve the national security of the United States. Called the "world's most complete amphibious training base," the 246 square mile military training facility has been an essential training ground for thousands of military personnel and is today the largest concentration of Marines and sailors in the world. U.S. Exh. 6, at 6-7; U.S. Ex. 5 (*Leatherneck* Magazine, p. 35, October 1981); U.S. Exh. 15 (The Coast of Carolina Salutes Camp Lejeune: Unofficial Guide, p. 2 (1970)). Thousands of Marines and sailors pass through Camp Lejeune every year where they receive valuable training to prepare them to defend our country in the operational forces. U.S. Exh 6, at 7. As President Bush recently observed, "[f]or more than 60 years, Marines have gone forth from Camp Lejeune to fight our country's battles." U.S. Exh. 8 (Bush, George W., Weekly Compilation of Presidential Documents, Vol. 39, Issue 14, page 405 (April 7, 2003)). The Marine Corps has used Camp Lejeune to train Marines to fight in World War II, Korea, Vietnam, Granada, Saudi Arabia, Panama, Kuwait, Somalia, Afghanistan, and Iraq. U.S. Exh. 6, at 7; U.S. Exh. 16 (Lineage of the 2d Marine Division).

As with many other military installations across the country, routine waste disposal practices at Camp Lejeune in years past caused environmental contamination. The major activities contributing to contamination included "fuel supply, storage, and transport support, electrical transformer maintenance and support, ordnance stockpiles and uses, pesticide mixing and application for disease control, fire training, provision of water and wastewater disposal services, dry cleaning activities, general utility maintenance services construction services, mechanical support maintenance services, including machine shop and degreasing capabilities, battery, radar and chemical treatment operations and maintenance as well as other related areas of support. U.S. Exh. 9, at 12 (Report of Davis L. Ford, P.E. Ph.D). In essence, Camp Lejeune was a major industrial complex, which also housed thousands of individuals. *See id.* In the 1980s, the military discovered TCE and PCE in the Camp Lejeune water supply system.

* * *

No. 08-894

In the Supreme Court of the United States

DONAL MCLEAN SNYDER, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a provision of a 1957 Naval manual eliminated government discretion for purposes of the Federal Tort Claim Act's discretionary function exception.

2. Whether there was a sufficient finding that petitioners' claims were susceptible to public policy considerations and therefore properly dismissed under the Federal Tort Claim Act's discretionary function exception.

3. Whether decisions regarding disposal of industrial waste at a military base are susceptible to public policy considerations under the Federal Tort Claim Act's discretionary function exception.

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In the Supreme Court of the United States

No. 08-894

DONAL MCLEAN SNYDER, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is not published in the *Federal Reporter*, but is reprinted in 296 Fed. Appx. 399. The opinion of the district court (Pet. App. 3a-15a) is reported at 504 F. Supp. 2d 136.

JURISDICTION

The judgment of the court of appeals was entered on October 16, 2008 (Pet. App. 16a). The petition for a writ of certiorari was filed on January 14, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Prior to the enactment in 1946 of the Federal Torts Claims Act (FTCA), 28 U.S.C. 1346(b), there was

no non-maritime judicial remedy for anyone whose injury or death was caused by action or inaction of the United States. See *Dalehite* v. *United States*, 346 U.S. 15, 24-25 (1953). The FTCA waives the United States' sovereign immunity and renders the United States liable for damages for the

> negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. 1346(b)(1). Congress, however, expressly excluded from that waiver

> [a]ny claim * * * based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

28 U.S.C. 2680(a). If a tort claim comes within that discretionary function exception, the claimant's remedy, if any, lies where it did before 1946—with Congress.

This Court has established a two-part test to determine the applicability of the discretionary function exception. First, the allegedly negligent act or omission must be a matter of discretion. *United States* v. *Gaubert*, 499 U.S. 315, 322 (1991). A government employee's conduct is not discretionary if a "'federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow,' because 'the employee has no rightful option but to adhere to the directive.'" *Ibid.*

(quoting *Berkovitz* v. *United States*, 486 U.S. 531, 536 (1988)).

Second, if the government employee had discretion, the discretionary function exception then applies if the conduct involved the kind of judgment that the discretionary function exception was designed to shield. *Gaubert*, 499 U.S. at 322-323; *Berkovitz*, 486 U.S. at 536-537. Because Congress intended the discretionary function exception to "prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy," *United States* v. *S.A. Empresa de Viacao Aerea Rio Grandense* (*Varig Airlines*), 467 U.S. 797, 814 (1984), the exception applies if the nature of the conduct is "susceptible to policy analysis," *Gaubert*, 499 U.S. at 325. Under this inquiry, the focus must be on the "nature of the conduct" and not the "status" of the allegedly negligent government employee or the employee's "subjective intent in exercising the discretion." *Id.* at 322, 325 (citation omitted).

2. Petitioner Donal McLean Snyder, Jr., served in the United States Marine Corps. He and his wife, petitioner Pam Snyder, were stationed at Camp Lejeune, North Carolina, from March through December of 1970. The couple had a son, petitioner Donal McLean Snyder, III (Donal III), in January 1971. The child was diagnosed with a congenital heart defect known as bicuspid aortic valve. In July 1971, petitioners returned to Camp Lejeune and remained there until October 1972. Pet. App. 4a.

In 2004, petitioners filed an action against the United States under the FTCA, alleging that the Camp Lejeune water system had been contaminated with the chemicals trichloroethylene (TCE) and tetrachloroethylene (PCE) because military personnel had used degreasing agents

to clean tanks and weapons on the base. Petitioners claimed that the chemicals were disposed of in barrels and directly onto the ground, and, consequently, the chemicals seeped into the soil and eventually migrated to the underground water supply. Petitioners alleged that Pam Snyder, in consuming Camp Lejeune water, was exposed to those chemicals while she was pregnant with Donal III, and that that exposure caused his heart defect. Petitioners' complaint asserted several tort claims alleging that the United States was negligent in disposing of chemicals and failing to protect Camp Lejeune's water supply. Pet. App. 4a-5a.

3. The district court dismissed petitioners' complaint for lack of subject matter jurisdiction. Pet. App. 3a-15a. Applying the FTCA's two-part discretionary function test, the district court concluded that the exception barred petitioners' action. First, the court concluded that disposal of the chemicals involved government discretion. The court found that there were no specific government provisions regulating TCE and PCE prior to and including the time that petitioners resided at or near Camp Lejeune. *Id.* at 9a-11a.[1] The only provision that petitioners had identified was from a 1957 Naval manual stating that "refuse * * * should not be disposed of where it may pollute surface or underground waters which are eventually to be used as drinking water." *Id.* at 9a (quoting *Bureau of Medicine and Surgery, U.S. Dep't of the Navy, NAVMED P-5010-*

[1] The district court noted that TCE and PCE were not regulated as pollutants under the Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. 1251 *et seq.*, the Resource Conservation and Recovery Act of 1976, 42 U.S.C. 6901 *et seq.*, or the Safe Drinking Water Act, 42 U.S.C. 300f *et seq.*, until well after the time period relevant to this lawsuit. Pet. App. 10a.

8, Manual of Naval Preventive Medicine, Art. 8-15, at 8-5 (June 1957) (*1957 Manual*)). The court noted that the *1957 Manual* did not mention TCE or PCE and failed to "offer any specific guidance regarding how to dispose of refuse, leaving to military personnel the determination of whether a particular disposal location would fall within the meaning of the phrase, 'where it [refuse] may pollute surface or underground waters,'" as used in the provision. *Id.* at 10a (quoting *1957 Manual*, Art. 8-15, at 8-5).

Second, the court found that the alleged negligent conduct was based upon policy considerations, citing factually analogous cases from the Tenth Circuit. Pet. App. 11a-14a (citing *Ross* v. *United States*, 129 Fed. Appx. 449 (10th Cir. 2005), and *Aragon* v. *United States*, 146 F.3d 819 (10th Cir. 1998)). The court noted that in *Ross* and *Aragon* landowners who lived adjacent to military installations claimed that military operations generated TCE contamination, which polluted residential well waters. In each case, the Tenth Circuit affirmed dismissal based upon the FTCA's discretionary function exception. Pet. App. 11a-13a. In particular, the district court quoted the Tenth Circuit's statement in *Aragon* that

> [there is] little doubt * * * the Air Force's actions involved policy choices of the most basic kind . . . . Indeed, the record makes clear the military recognized it needed flexibility to weigh its groundwater protection policies against broader public and military policies; thus it allowed the Air Force to place security and military concerns above any other concerns.

Id. at 13a (quoting *Aragon*, 146 F.3d at 826). The court concluded that these "authorities * * * make it clear that these types of decisions by the military regarding operations at Camp Lejeune were the kinds of government policy choices the discretionary function exception was designed to shield." *Id.* at 14a.

4. In an unpublished decision, the court of appeals affirmed. Pet. App. 1a-2a. Finding that the district judge had "entered a thorough and thoughtful opinion," the court affirmed "[e]ssentially for the reasons stated by the district court." *Id.* at 1a.

ARGUMENT

The unpublished decision of the court of appeals does not warrant further review. The district court correctly applied the two-part test established by this Court for determining the applicability of the Federal Torts Claims Act's discretionary function exception, and the court of appeals correctly affirmed that decision. The court of appeals' non-precedential decision neither conflicts with any decision of this Court or of any other court of appeals, nor presents any issue of general importance warranting further review.

1. Although petitioners assert (Pet. 5-6) that this case implicates circuit conflicts on two issues, the court of appeals' decision was not predicated on either of those issues. The asserted conflicts, accordingly, provide no basis for reviewing the court of appeals' decision.

a. Petitioners contend (Pet. 5) that this Court's review is warranted because there is an intercircuit conflict regarding whether the FTCA's discretionary function exception is a jurisdictional prerequisite. But the court of appeals' decision was not based on the jurisdictional nature of the discretionary function exception. In

the absence of any indication that that issue had a bearing on the present case, it provides no basis for further review.

While the district court dismissed the case for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1), see Pet. App. 15a, the district court's ultimate resolution of the case was not predicated upon the jurisdictional nature of the discretionary function exception. There is no indication in the district court's decision that it placed the burden of proof on petitioners or resolved any factual issues. See *id.* at 9a-14a. Cf. *Aragon* v. *United States*, 146 F.3d 819, 832 (10th Cir. 1998) (placing burden of proof on plaintiff in addressing FTCA's discretionary function exception). To the contrary, the court accepted the petitioners' allegations and assertions of fact at face value. See Pet. App. 4a-5a. The court of appeals, in an unpublished opinion, merely noted that the dismissal was for lack of subject matter jurisdiction and affirmed "[e]ssentially for the reasons stated" by the district court. *Id.* at 2a. Petitioners have not shown or argued that the decisions below would have been any different had the district court dismissed the case for failure to state a claim, Fed. R. Civ. P. 12(b)(6), or for failure to raise a material issue of triable fact, Fed. R. Civ. P. 56.

Even if the outcome of this case had turned on the court's treatment of the FTCA's discretionary function exception as jurisdictional, no square circuit conflict exists regarding that issue. Citing *Clark* v. *United States*, 326 F.3d 911 (2003), petitioners state that the "Seventh Circuit has suggested that the treatment of the discretionary function exception as a jurisdictional prerequisite is not correct." Pet. 5 & n.1. *Clark*, however, did not involve the FTCA's discretionary function

exception, but rather the exception for any "claim arising in respect of the assessment or collection of any tax." 28 U.S.C. 2680(c). See *Clark*, 326 F.3d at 913. Moreover, the court found that treatment of the exception as "jurisdictional," rather than as an element of the plaintiff's statutory right to relief, "does not matter" because the district court had correctly concluded that the plaintiffs' claim could not proceed under the FTCA. *Ibid.*[2]

b. Petitioners also assert (Pet. 6) that there is a circuit conflict regarding whether federal agency manuals can create mandatory obligations that eliminate government discretion under the FTCA's discretionary function exception. The purported circuit conflict, however, is not implicated in this case because the issue was not dispositive or even addressed in the courts below. And this Court's ordinary practice is "not [to] decide in the first instance issues not decided below." *National Collegiate Athletic Ass'n* v. *Smith*, 525 U.S. 459, 470 (1999); see *United States* v. *United Foods, Inc.*, 533 U.S. 405, 417 (2001).

Under the first part of the discretionary function test, a government employee retains discretion as long as no "federal statute, regulation, or policy specifically

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[2] More recently, in *Parrott* v. *United States*, 536 F.3d 629 (2008), the Seventh Circuit stated in dicta that the FTCA's statutory exceptions, including the discretionary function exception, "limit the breadth of the Government's waiver of sovereign immunity," but not "by withdrawing subject-matter jurisdiction from the federal courts." *Id.* at 634. Accordingly, the court stated that the United States has the "burden to assert these exceptions." *Id.* at 635; see also *Collins* v. *United States*, No. 08-1334, 2009 WL 1162529, at *4 (7th Cir. May 1, 2009) (citing *Parrott*, stating in dicta that the discretionary function exception is not jurisdictional, recognizing that the government raised the discretionary function exception, and holding that the exception applied).

prescribes a course of action for [the] employee to follow." *Berkovitz* v. *United States*, 486 U.S. 531, 536 (1988). Therefore, to remove discretion, a provision must not only be prescriptive or mandatory, but it must also be specific. Here, the district court's decision did not turn on whether provisions in a federal agency manual could be mandatory, but rather on the court's finding that the particular provision at issue here was *not sufficiently specific* to remove discretion. The district court noted that the provision in the *1957 Manual* upon which petitioners relied did not mention TCE or PCE and only addressed "refuse" disposal in general. Pet. App. 10a. The court found that there was no "*specific guidance* regarding how to dispose of refuse, leaving to military personnel the determination of whether a particular disposal location would fall within the meaning of the phrase 'where it [refuse] may pollute surface or underground waters.'" *Ibid.* (emphasis added). That fact-bound determination does not merit this Court's review.

In any event, petitioners have failed to demonstrate that there is a conflict in the circuit courts regarding whether provisions in federal agency manuals are inherently mandatory. Petitioners rely upon a pre-*Berkovitz* case, *Clark* v. *United States*, 660 F. Supp. 1164, 1172-1173 (W.D. Wash. 1987), aff'd, 856 F.2d 1433 (9th Cir. 1988), in which a district court found that certain military manuals contained mandatory requirements and held that the discretionary function exception did not apply. The Ninth Circuit affirmed that decision in a one sentence order "for the reasons stated in the district court's opinion." 856 F.2d at 1434. In *Aragon*, the Tenth Circuit stated that "[a]n agency manual, in contrast to a regulation, is not *necessarily* entitled to the force and effect of law." 146 F.3d at 824 (emphasis add-

ed). The court noted that a particular manual's qualification that it was "intended for guidance" because of the "varied nature of industrial problems" weighed "heavily against ruling the Manual prescribed mandatory directives." *Id.* at 824-825 (citation omitted). Those case-specific decisions do not create a conflict regarding any general issue of whether provisions in an agency manual should be regarded as mandatory for purposes of the discretionary function exception.

2. The courts below correctly applied the discretionary function exception. Petitioners' claims of error are unfounded and do not, in any event, provide a basis for this Court's review.

a. Petitioners contend (Pet. 9-11) that the court of appeals erred in affirming the district court's finding that a provision from the *1957 Manual*, stating that "refuse, in any form, should not be disposed of where it may pollute surface or underground waters which are eventually to be used as drinking water," was not sufficiently specific to remove discretion. Pet. 9 (quoting *1957 Manual*, Art. 8-15, at 8-5). Petitioners, however, do not show how the provision specifically prescribed a course of action by removing an employee's choice regarding how to act. See *Berkovitz*, 486 U.S. at 536. As the district court explained, the provision did not mention TCE or PCE and failed to "offer any specific guidance regarding how to dispose of refuse," and it left to military personnel the determination of whether disposal in a particular location might pollute drinking water. Pet. App. 10a.

In essence, petitioners contend (Pet. 11) that the discretionary function exception is inapplicable because the regulation is a binding directive against water pollution, and water pollution nevertheless occurred. As courts

have consistently held, however, goal-based water pollution provisions do not prescribe a specific course of conduct under the first part of the discretionary function test. See *OSI Inc.* v. *United States*, 285 F.3d 947, 952 (11th Cir. 2002) (finding that objectives and principles do not create mandatory directives that overcome the discretionary function exception); *Aragon*, 146 F.3d at 826 (stating that a pollution prevention provision suggests "principles rather than practices," and "[a]n objective, alone, does not equate to a specific, mandatory directive").[3]

b. Petitioners also contend (Pet. 15-21) that the district court failed to make a finding on the second part of the discretionary function test, and industrial waste disposal is not the type of conduct that the exception was designed to shield. Petitioners are mistaken.

The district court plainly found that the alleged negligent conduct was grounded in policy considerations. In addressing the second part of the discretionary function test, the court cited the factually analogous *Ross* and *Aragon* cases, which involved claims that military operations, including waste disposal, caused TCE contamination of drinking water. Pet. App. 11a-14a. The district court quoted *Aragon*'s statement that disposal of solvents at an Air Force Base "involved policy choices of

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[3] Petitioners' reliance (Pet. 9-10) upon *Starrett* v. *United States*, 847 F.2d 539, 541-542 (9th Cir. 1988), is misplaced. In *Starrett*, the court held that the requirement of "secondary treatment" of certain wastes was sufficiently specific to overcome the discretionary function exception. But the "secondary treatment" prescription at issue in *Starrett* mandated particular conduct, whereas the *1957 Manual* provision at issue here seeks a particular result and does not prescribe specific conduct. Moreover, the Ninth Circuit decided *Starrett* prior to this Court's discussion in *Berkovitz*.

the most basic kind," because "the military recognized it needed flexibility to weigh its groundwater protection policies against broader public and military policies" and to place "security and military concerns above any other concerns." *Id.* at 13a (quoting *Aragon*, 146 F.3d at 826). The court then concluded that these "authorities * * * make it clear that these types of decisions by the military regarding operations at Camp Lejeune were the kinds of government policy choices the discretionary function exception was designed to shield." *Id.* at 14a. Thus, the district court expressly held that the second part of the test was satisfied.

Petitioners incorrectly contend (Pet. 18-19) that the military's decisions regarding the disposal of waste solvents at Camp Lejeune "do not rise to the level of public policy, but rather are issues dealt with by landfills and waste removal companies on a daily basis." The fact that the conduct at issue may also be performed by private persons on a daily basis is not dispositive of the inquiry. See *Gaubert*, 499 U.S. at 320, 325 (holding that the discretionary function exception barred challenges to the day-to-day government supervision of a federally-insured savings and loan). The military's waste disposal decisions are necessarily intertwined with, and subject to, the policies underlying the military's broader mission, as embodied in Department of Navy regulations. See generally 10 U.S.C. 5063; 32 C.F.R. 700.202. As courts have consistently recognized, waste disposal and environmental protection decisions at military bases implicate public policy considerations. See *Ross* v. *United States*, 129 Fed. Appx. 449, 451-452 (10th Cir. 2005); *Aragon*, 146 F.3d at 826-827. See also *OSI*, 285 F.3d at 953 (the second part of the discretionary function analysis was satisfied where "[t]he nature of the military's

function requires that it be free to weigh environmental policies against security and military concerns"); *Western Greenhouses* v. *United States*, 878 F. Supp. 917, 929 (N.D. Tex. 1995) (decisions regarding whether to take measures for environmental protection at a military base were protected by the discretionary function exception, such conduct implicated public policy because decision-makers must "balance two of the nation's top priorities: national defense and environmental protection").[4]

Petitioners erroneously rely (Pet. 12-13) upon this Court's holding in *Indian Towing Co.* v. *United States*, 350 U.S. 61, 69 (1955), that the government could be liable under the FTCA for failing to maintain a lighthouse after the government had made the discretionary decision to operate the lighthouse. As petitioners acknowledge (Pet. 12) and as this Court recognized in *Gaubert*, 499 U.S. at 326, the United States did not raise the FTCA's discretionary function exception in *Indian Towing*. Instead, the United States argued that the FTCA provided immunity for "uniquely governmental functions." *Indian Towing*, 350 U.S. at 64. This Court explained in *Gaubert* that "[t]he United States was held liable [in *Indian Towing*], not because the negligence occurred at the operational level but because making sure the light was operational 'did not involve any permissible exercise of policy judgment.'" 499 U.S. at 326 (quoting *Berkovitz*, 486 U.S. at 538 n.3). Because the conduct at issue in the present case was grounded in

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[4] Citing *Loughlin* v. *United States*, 393 F.3d 155 (D.C. Cir. 2004), petitioners argue (Pet. 18-19) that only munitions disposal decisions implicate military policies, and the discretionary function exception should not shield the military's disposal of other substances. But *Loughlin*'s reasoning did not turn on the fact that munitions were at issue in that case. See 393 F.3d at 163-164.

public policy considerations, the decisions below are fully consistent with *Indian Towing*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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